

THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

**EXPERIENCE HENDRIX, LLC**, a Washington  
Limited Liability Company, and **AUTHENTIC  
HENDRIX, LLC**, a Washington Limited Liability  
Company,

Plaintiffs,

v.

**HENDRIXLICENSING.COM, LTD** d/b/a  
**HENDRIX ARTWORK** and  
**HENDRIXARTWORK.COM**, a Nevada  
Corporation, and **ANDREW PITSICALIS** and  
**CHRISTINE RUTH FLAHERTY**, husband and  
wife,

Defendants.

No. C-09-0285 TSZ

**DEFENDANTS' MOTION TO EXCLUDE  
PLAINTIFF'S EXPERT RICHARD YALCH**

**NOTE ON MOTION CALENDAR:  
APRIL 27, 2011**

COMES NOW Defendants Pitsicalis et al (hereafter "Pitsicalis") to move the Court in  
limine to exclude the expert testimony of Professor Richard Yalch from being offered by  
Plaintiffs (hereafter "Experience") at trial.

**Experience's Expert Professor Yalch Should Still Be Excluded**

Experience has offered Professor Yalch to assist in the establishment of damages  
pursuant to Rule 26 (a)(2): Experience submitted an expert disclosure on November 4, 2009.  
See Document No. 33. Defendants moved in limine to exclude Professor Yalch because his

1 report disclosed opinions and reasons therefore that are wholly inconsistent with the court's  
 2 subsequent rulings and no supplement had been offered. See Defendant's motion in Limine,  
 3 Document 112.

4 In a Minute order on 4/19/2011 the Court granted Defendant's motion in part, excluding  
 5 testimony by Professor Yalch on the "Jimi Hendrix Brand" which was described in his report as  
 6 encompassing Jimi Hendrix song titles and/or lyrics, nor offer opinion concerning Plaintiff's right  
 7 to control dissemination of the Jimi Hendrix image, whether it "wholesome", "dug associated", or  
 8 some other form. See document 116 at (b).

9 The court deferred ruling on Professor Yalch's ability to offer testimony on damages or  
 10 any other matter pending an offer of proof by Plaintiffs due by April 22, 2011. See id. At pre-  
 11 trial the offer was discussed, and the court granted leave for Defendants to file the extant motion  
 12 to exclude.

### 13 ***Professor Yalch's Original Report***

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 15 Professor Yalch's original report was based on the damages to Experience's "Jimi  
 16 Hendrix Brand" as the sole source of Jimi Hendrix related merchandise. See Expert Witness  
 17 Disclosure Document 33 at 5-7. He also refers to the false impression caused by association  
 18 with Jimi Hendrix song titles, which has also been found to not be infringing activity by the Court  
 19 in its most recent order. See id. Finally he offers no amounts of damages or basis of such  
 20 amounts in his reports except for Pitsicalis's gross receipts. No testimony as to amounts of  
 21 actual damages, sums for corrective advertising, or other theory of damage were disclosed as  
 22 required by Rule 26 (a)(2)<sup>1</sup>. In sum, Professor Yalch's opinions in his original report were not  
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 25 <sup>1</sup> Under Rule 26 (a)(2)(B) all experts must provide a written report prepared and signed by them, containing a  
 26 "complete statement of all opinions to be expressed and the basis and reasons therefore".

grounded in the current state of the law concerning Jimi Hendrix publicity rights and trademarks, or were not disclosed pursuant to the rule, and as a result should be excluded, which in part they were.

### ***Experience's April 22, 2011 Offer of Proof***

In response to the courts order, Experience filed an "Offer of Proof". See Document 123. Attached to the offer and incorporated by reference is what Experience expressly refers to as the "Supplemental Report of Richard Yalch PHD". See id at 1. First and foremost this supplemental report has been offered too late to create an admissible basis for the opinions expressed therein. Rule 26 (e)(1) states:

"A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. *With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or changes to this information shall be disclosed by the time the party's disclosures under Rule 26 (a)(3) are due.*" (Emphasis Added)

Here what we have is a supplemental report, clearly trying to correct the original report of Professor Yalch that was predicated on several incorrect bases about Experience's exclusive control of the "Jimi Hendrix Brand." It is untimely and should be excluded<sup>2</sup>. Absent consideration of this supplemental report offer of proof fails, since it cites not to the original

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<sup>2</sup> Rule 26(a)(3) requires that such supplements be made consistent with orders of the court on disclosure, or 30 days before trial, here this report was served 12 days before trial and thus too late to be considered.

1 report, but only to the supplement. For that reason alone Professor Yalch's testimony should be  
2 barred.

3 Additionally, in an attempt to avoid this fatal flaw, Experience argues that this  
4 supplement offers no new opinions, but only seeks to "clarify prior opinions". See Plaintiff's  
5 Offer, Document 123 at 2. However, this claim does not withstand scrutiny. In the original  
6 report Professor Yalch concentrated exclusively on the "Jimi Hendrix Brand", referring to  
7 Experiences "exclusive control" and stewardship of Jimi Hendrix. See Expert Disclosure  
8 Document 33 pp 3-7. In the new offer of proof Professor Yalch now for the first time discusses  
9 the strength and value of Experience's marks, as opposed to the value of being the exclusive  
10 rightful source of Jimi Hendrix products, and how Pitsicalis's actions have affected those marks  
11 as opposed to the "Jimi Hendrix Brand" generally. See Plaintiff's Offer Document 123 pp 10-13.  
12 Professor Yalch is not offering "clarifications" but entirely new opinions and theories designed to  
13 avoid the Court's rulings finding Jimi Hendrix's publicity rights in the Public Domain, nominative  
14 fair use of the names "Hendrix" and "Jimi Hendrix", and lack of unfair competition in use of Jimi  
15 Hendrix song titles and lyrics<sup>3</sup>.

16 This is underscored by a review of the materials provided to Professor Yalch for creation  
17 of this report. Namely the Court's substantive rulings since the original report was created and  
18 disclosed. See id at 21 (Materials Received on April 21, 2011). In short, Experience wants to  
19 offer Professor Yalch to provide expert testimony, the conclusions and basis thereof which were  
20 not timely provided pursuant to Rule 26. Experience had a duty to supplement Professor  
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23 <sup>3</sup> In fact in some portions of the report it appears "Jimi Hendrix Brand" was removed and references to Experience's  
24 marks were substituted, such as with the "nature of corrective advertising" recommended. This is a literal example  
25 of what the report attempts to do generally, offer substitute basis for opinions in the original report, in contravention  
26 of the rules.

1 Yalch's report once its opinions and basis became incorrect due to the Court's rulings. They  
2 failed to do so until this late hour and should not be allowed offer such testimony given their  
3 delay. Moreover, Pitsicalis would be prejudiced by having insufficient time to evaluate, obtain  
4 and provide rebuttal testimony if he so chose, or depose Professor Yalch<sup>4</sup>.

5 Finally, allowing testimony based on the prior report would be inconsistent with current  
6 state of the law as it is all predicated on Experience having an exclusive "Jimi Hendrix Brand".  
7 Allowing testimony on the supplemental report would put Pitsicalis in a classic "catch 22" since  
8 the best way to impeach the new opinions would be to bring up that they were previously  
9 predicated on this "Jimi Hendrix Brand" concept, and not Experience's specific trademarks. But  
10 such testimony is now barred by Court order. Such an order would not have been sought had  
11 Experience timely supplemented its report as required. This is yet another example of the  
12 necessity and wisdom of the requirement for timely and complete supplemental reports under  
13 the Rule 26 and why it must be enforced.

### 14 Conclusion

15 Experience's offer of proof is based on an untimely supplemental report, not the original  
16 report as required. It does not offer clarifications, but new opinions and basis for opinions. As a  
17 result, Pitsicalis would be prejudiced if Professor Yalch were allowed to testify. Therefore, for all  
18 of these reasons he should be excluded.

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24 <sup>4</sup> Experience will undoubtedly argue that Pitsicalis never chose to depose Professor Yalch or obtain its own expert.  
25 However, that is exactly the point of the report and supplement requirements of Rule 26. It allows a party to evaluate  
26 the necessity of those actions. Without a timely supplement, Pitsicalis was denied that opportunity.

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2 SUBMITTED this 27<sup>th</sup> day of April, 2011.  
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